

Case number: **331027**

General Insurance - Domestic Insurance - Motor Vehicle - Comprehensive - FSP Decision - Denial of Claim - Applicant Non-Disclosure

26 March 2014

Summary

Description

- A claim under a Comprehensive Motor Vehicle Insurance policy following an accident on 26 August 2013.
- The FSP has denied the claim and maintain that the Applicant had breached her duty of disclosure on inception of the policy.

Basis of Determination

- The Applicant's policy of insurance was incepted through N acting under a binder with insurer C and insured the Applicant for the period from 25 June 2012 to 1 January 2013.
- N subsequently acting on a binder with the FSP offered to renew the Applicant's insurance for the period 1 January 2013 to 31 December 2013.
- The offer of insurance whilst identifying the offer constituting a new contract of insurance does not detail over the Applicant's duty of disclosure or the relevant questions.
- Insofar as the email of 13 December 2012 relates to the duty of disclosure, the FSP through N only identifies that it is material to disclose any loss of license, speeding fines, traffic convictions etc. There is no reference to the Applicant's prior claims history.
- The FSP has not complied with Section 21A or Section 22 of the Insurance Contracts Act 1984 (the Act) on inception of the policy of insurance for the period 1 January 2013 to 31 December 2013.

Determination

- The FSP is liable to indemnify the Applicant in accordance with the terms and conditions of the policy subject to the Applicant's payment of the premium for the period 1 January 2013 to 31 December 2013.

- Should the FSP elect to cash settle the claim, then interest is payable pursuant to Section 57 of the Act from 12 July 2013 until date of settlement.

Background

1. The Applicant held a comprehensive motor vehicle insurance policy with the Financial Services Provider (FSP) via her leasing company N. The policy was originally underwritten by Insurer C from 25 June 2012 to 31 January 2013. It was underwritten by the FSP from 1 January 2013 to 31 December 2013.
2. The Applicant lodged a claim with the FSP for damage sustained to her vehicle, a 2012 Volkswagen Golf 90 TSI Trendline, after it collided with a fence on 26 August 2013.
3. The FSP denied liability for the Applicant's claim on the grounds she had failed to notify it of her accurate insurance claims history. Namely, it would have not have renewed her policy had she disclosed her claims history.
4. The Applicant expects the FSP to honour the claim.

Summary of Applicant's position

5. The Applicant says:
 - The FSP's representative was aware of one of her previous claims as he was informed that this was the reason for her purchasing a new vehicle;
 - The FSP's representative should have contacted her and clarified with her why she had not disclosed the previous claim in her proposal form. This would have reminded her to disclose her previous claims;
 - N has been negligent in reviewing her proposal form and did not ask her to provide a claims history at any time before the policy was issued;
 - The FSP failed to provide the policy documents or the FSP's email may have been diverted to the junk mail box of her email account; and
 - She was not aware the initial policy period (C) was limited to six months and that she has been insured by the FSP since then.

Summary of FSP's position

6. The FSP maintains denial of the claim on the grounds that both C and it would not have agreed to accept or renew the Applicant's policy in June 2012 and in January 2013 had she informed N about her actual claims history.

7. The FSP relies on its underwriting guidelines and a statutory declaration from its underwriter which confirms it would not have accepted the Applicant's risk due to her claims history.
8. Had the Applicant declared the one claim, it would have still accepted her risk.
9. It has evidence the policy documents were emailed to the Applicant's current email address.
10. The FSP relies on the following policy provisions:

"Duty of Disclosure

Whether you are entering into a policy for the first time or are proposing to renew, vary, extend or reinstate a policy you have a duty of disclosure in terms of the Insurance Contracts Act 1984.

Your Duty of Disclosure for New Policies

When answering our questions you must be honest and you have a duty under law to tell us anything known to you, and which a reasonable person in the circumstances, would include in the answer to the question. We will use the answers in deciding whether to insure you and anyone else to be insured under the policy, and on what terms.

Your Duty of Disclosure for Renewals

If you have already entered into a policy and you are proposing to renew, vary, extend or reinstate the policy your duty of disclosure changes. You have a duty to tell us of everything that you know, or could reasonably be expected to know, that is relevant to our decision to insure you and to the terms of that insurance. If you are not sure whether something is relevant you should inform us anyway.

...

If You Do Not tell Us

If you do not answer our questions in this way or disclose everything you know, we may reduce or refuse to pay a claim, or cancel the policy. If you answer our questions fraudulently, we may refuse to pay a claim and treat this policy as never having been in force.

Significant Features and Benefits of this Policy”

Issue

11. Whether the FSP is entitled to deny the Applicant’s claim on the grounds of non-disclosure.

Reasons for decision

12. Due to the nature of this dispute, FOS has considered it appropriate to expedite the dispute in accordance with the Operational Guidelines to the FOS Terms of Reference. This dispute has not been the subject of a FOS Recommendation and has proceeded directly to Determination.
13. I am satisfied a full exchange of information has taken place between the parties and each party has had the opportunity to address any issues raised.
14. There is no dispute the Applicant’s claim falls within the general cover of the policy. The issue remains whether the FSP was entitled to deny liability for the claim on the grounds of non-disclosure.
15. I note the policy was branded as ‘N Insurance’ and it was initially underwritten by C. As such, I am satisfied the parties to the contract at that time were C and the Applicant and N was simply an intermediary involved in the issuing of the policy.
16. Similarly, when the policy was renewed in January 2011, there was a change of underwriters and as such, the parties to contract changed to the FSP and the Applicant.
17. Even though the FSP is of the view the contract entered into between the parties in January 2013 to be a renewal and not a new policy, I am satisfied the policy from January 2013 would be considered as a new policy because the parties to the contract changed. Namely, a new contract between the FSP and the Applicant commenced.

Non-Disclosure

18. The *Insurance Contracts Act* 1984 (the Act) places various obligations on the FSP and the Applicant in relation to the provision of information.
19. Section 21 of the Act provides that an insured has a duty to disclose to the insurer, before entering into a contract of insurance, every matter that person knows, or a reasonable person in the circumstances knows to be relevant to the decision of the insurer whether to accept the risk of insurance or not.
20. Section 21A of the Act limits the disclosure obligations of an insured to answer specific questions asked at policy inception by the insurer which are relevant to the insurer’s decision whether or not to accept the risk and

provided that the insurer asks the insured to disclose such exceptional circumstances of which the insured is reasonably aware at the relevant time.

21. Section 22 of the Act provides that the insurer must, before a contract is entered into, clearly inform the insured person of the nature and effect of the duty of disclosure. This section also provides that an insurer who fails to provide this information cannot exercise rights in relation to an innocent non-disclosure.
22. Section 28 of the Act describes the rights of the insurer where there has been a non-disclosure or misrepresentation by the insured. Subsection 3 of that section provides that where an innocent non-disclosure or misrepresentation has been made, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which it would have been but for the non-disclosure or misrepresentation.
23. Considering the above, I am of the view the FSP on inception of the policy in January 2013 is obliged to satisfy the requirements of Sections 21A and 22 of the Act in order to rely on the grounds of the non-disclosure in denying liability for the claim.
24. There is no evidence the Applicant was notified of the details of her duty of disclosure or whether she was asked specific questions in relation to her insurance claims history when the new policy was issued in January 2013.
25. As such, I am of the opinion the FSP has failed to satisfy the requirements of the Act in this regard.
26. I accept based on the underwriting guidelines the FSP would not have accepted the Applicant's risk had she disclosed her claim history and that the FSP's representative not noting the one claim disclosed by her would not have had any impact on its final decision to deny her claim.
27. I also accept the FSP has established the policy documents were emailed to the Applicant and that it has informed her of the terms and conditions of the policy after the contract was entered into between the parties.
28. The FSP is however required to comply with Sections 21A and 22 of the Act before the contract was entered into and in the Applicant's case it has not established that it has done so.
29. Therefore, I am not satisfied the FSP was entitled to seek refuge under Section 28(3) of the Act in denying liability for the Applicant's claim on the grounds of non-disclosure because it has failed to comply with the precursors to this section which are Sections 21A and Section 22 of the Act.
30. I note the FSP has refunded the full premium taken from the Applicant from 25 June 2012 until 1 January 2014. I am of the view the FSP was not obliged to do so as the Applicant's claim occurred during the policy period from 1 January 2013 to 31 December 2013.

Determination

31. On the basis of the available information, I determine:
- The FSP is not entitled to deny liability for the Applicant's claim;
 - The FSP should settle the claim in accordance with the terms and conditions of the policy;
 - The Applicant is obliged to pay the FSP the premium for the period from 01 January 2013 to 31 December 2013 as her vehicle has been deemed a total loss; and
 - If the FSP elects to cash settle the Applicant for the loss, it should pay interest at the statutory rate pursuant to Section 57 of the *Insurance Contracts Act 1984* from 12 July 2013, until settlement.